No. 42021-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

VERONICA WITTEN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Katherine M. Stolz (trial) and the Honorable Bryan Chushcoff (motions), Judge

---

OPENING BRIEF OF APPELLANT

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

U.S. SUPREME COURT AND FEDERAL CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. Appellant Veronica Witten was deprived of her Article 1, § 9 and Fifth Amendment rights and her state and federal due process rights when the prosecutor elicited testimony which implied that a negative inference should be drawn from Witten's post-arrest silence.

2. The prosecution committed grave, constitutionally offensive misconduct and violated Witten's Article 1, § 9, Fifth Amendment and due process rights by exploiting the evidence of Witten's post-arrest silence in arguing guilt in closing argument.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. It is a violation of a defendant's rights to remain silent in the face of accusation and a further violation of the defendant's due process rights to fundamental fairness for the state to first tell that citizen that they have a constitutional right to remain silent and then use that silence against them as evidence at a criminal trial.

   Witten was accused various crimes for having shot her husband. After she was arrested and read her rights, she declined to waive them, instead remaining silent except for asking officers to check on her husband and dogs.

   a. At trial, the prosecutor repeatedly asked several officers and the defense mental health expert about Witten's failure to say certain things to police at various times, all of which were after Witten had been read her rights and declined to waive them.

      Did the prosecutor commit constitutionally offensive misconduct and violate Witten's rights to remain silent and to due process by eliciting this testimony about Witten's "failure" to speak to police after she had been read her rights where the testimony was elicited in such a way as to suggest that Witten's failure to speak to police proved her guilt?

   b. Did the prosecutor commit further constitutionally offensive misconduct and violation of Witten's rights by then exploiting the testimony she had elicited and using it to suggest, in rebuttal closing argument, that Witten was guilty and not suffering from diminished capacity at the relevant time?

c. Is reversal required for this serious, prejudicial and constitutionally offensive misconduct and violation of Witten's rights to remain silent and to due process because the prosecution cannot satisfy the heavy burden of proving these constitutional errors "harmless" beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Veronica Witten was charged by amended information with attempted first-degree murder, first-degree burglary and violation of a restraining order, with both the attempted murder and burglary counts alleged to have been "domestic violence" incidents and committed while armed with a firearm. CP 48-49; RCW 9.41.010, RCW 9.94A.530, RCW 9.94A.533, RCW 9A.28.020, RCW 9A.32.030(1)(a), RCW 9A.52.020(1)(a), RCW 10.99.020, RCW 26.50.110(1).

Pretrial proceedings were held before the Honorable Bryan Chushcoff on January 29, 2010, and the Honorable Katherine Stolz on December 17, 2010, and trial was held before Judge Stolz on February 14, 22, 24 and 28, March 1-3, 7-9, 14-16, 2011, after which the jury found Witten guilty as charged. CP 276-85; 1RP 1, 2RP 1, RP1, 28, 219, 354, 508, 651, 845, 1017.[1]

Sentencing was held before Judge Stolz on March 25, 2011, after which the judge imposed a sentence totaling 501 months. CP 295-307.

---

[1]There are 10 volumes of transcript, some containing multiple days. The volumes will be referred to as follows:

the volume containing both proceedings of January 29, 2010, as "1RP;"
December 17, 2010, as "2RP;"
the eight chronologically paginated volumes containing the proceedings of February 14, 22, 24 and 28, March 1-3, 7-9, 14-16 and 25, 2010, as "RP."

On May 28, 2011, the court corrected the judgment and sentence nunc pro tunc, reducing the actual number of months of confinement ordered to 467 months total and deleting language in the judgment and sentence about the counts running consecutive. CP 308-10.

Witten appealed, and this pleading follows. See CP 315.

2. Testimony at trial

On December 4, 2009, Veronica Witten shot her husband, Michael Witten, causing him to lose his left kidney and have other medical issues. RP 338, 375-76, 519-20. Veronica[2] did not deny that the incident occurred or that she shot her husband that night. RP 856-1029. Instead, her defense was that she was incapable of forming the intent to commit the either attempted murder or burglary with which she was later charged, because of her mental conditions, several of which were the result of suffering years of abuse at Michael's hands. RP 856-1029.

In Michael's version of events, he had gotten home from work at the army base to find his girlfriend, Anna Meaungkhot, inside his apartment, making dinner. RP 332. Michael grabbed a beer and told Meaungkhot that he was going outside to smoke a cigarette, heading out onto the back patio through a sliding glass door. RP 337-39. He had just started smoking when Veronica came up from the left side of the patio, around the outside of the apartment. RP 343.

According to Michael, Veronica said, "I bet you didn't expect to see me ever again." RP 342-43. Michael told Veronica she was not

[2]Because they share the same last name, for clarity herein Michael and Veronica Witten will be referred to by their first names, with no disrespect intended.

supposed to be there and Veronica said, "I know." RP 343. At the time, Veronica and Michael had mutual restraining orders against eachother, requiring them to stay a certain distance away from eachother and one another's homes. RP 369-70.

Michael would later testify that, at that point, he put out his cigarette and went into the apartment, closing the sliding glass door behind him. RP 343. He said he was looking down and working the lock to secure it when he saw Veronica on the other side of the door with a handgun, which she held at waist level. RP 343-35. Michael said he then saw a "muzzle blast" and felt an impact in his lower left abdomen, after which he fell onto the living room floor. RP 346.

In talking to an officer just after the incident, however, Michael claimed he had seen the gun when he was outside and had run inside, closed and locked the door before Witten had shot him. RP 567.

After that, Michael claimed, Veronica's hand came through the broken glass door and pointed the gun at Meuanghkhot, who was running out the door. RP 346-47. A moment later, however, Michael said that Veronica was fumbling with the gun, trying to work the slide. RP 347. An officer who spoke with Meuangkhot after the incident said Meuangkhot thought Witten had "a look of satisfaction" on her face as she raised the gun towards the other woman. RP 536.

At trial, Michael said that, at this point, he got up and ran to grab the shotgun from his room and came back out to see Veronica still there in the living room, trying to work the slide. RP 348-39. To an officer, however, Michael claimed that Veronica had followed him into the

bedroom where he got his shotgun but for some reason they had just ended back up in the living room again. RP 568.

Either way, when they were both back in the living room, Michael tried to grab the weapon that Veronica was gripping. RP 350. Michael said that Veronica turned her body at that point and that Michael just threw down his own shotgun, grabbed around Veronica's body and tried to get control of the gun she had. RP 350. They sort of wrestled and he had gotten her out onto the patio when she suddenly said, "let me go," seeming to Michael to be giving up. RP 351. Somehow she sort of threw or "flung" him back and he then fell to the ground, after which she just walked off nonchalantly. RP 351-53.

At that point, Michael called his commanding officer and police. RP 371. He was given medical assistance first from someone Meuangkhot had encountered in the hall as she sought help, and then at the hospital. RP 371.

Michael conceded that, when Veronica was outside the glass door with the gun, her expression was "this, like, stare." RP 344. He also noted that, after they struggled over the gun and she had thrown him to the ground, she walked off "all nonchalant," having the air of "like, nothing ever happened." RP 352. Not only did she not run away as Michael admitted he himself would have done if he had been in her situation, but also, when she drove away, Veronica did not speed or cause the car tires to squeal, instead simply driving out very "easy." RP 352. Meuangkhot confirmed that the car drove slowly, rather than with any haste or urgency, as did the man who ended up providing some medical assistance to

Michael prior to the medical staff arriving. RP 441, 468-69. That man, Maurice Johnson, also saw the car drive away and said it was moving off as if the driver was having "just another day." RP 470-71.

Michael admitted that Veronica had suffered from mental problems, including depression, for much of their more than 15 years of marriage. RP 384. He said Veronica was sad, seemed to have low energy, cried a lot, had mood swings, would sometimes stay in her bedroom for days, and also seemed to swing from being really depressed to "high on life." RP 384-85. Veronica had sought counseling for it when the couple were living in Germany, at a time when Michael was posted or stationed there by the army. RP 385. Michael also admitted that Veronica had gotten treatment for her mental health issues at a Fort Hood army facility, when they had lived at that base. RP 386-87. And Veronica had been hospitalized for her mental problems in April of 2000 at Michael's own urging, but she checked herself out after a day. RP 389-90. Michael dismissed those efforts, declaring that Veronica "never followed through with anything," something he said she did because she did not see herself as needing mental health treatment. RP 387-89.

Michael confessed that there were arguments between them about Veronica's problems and that he had filed for divorce several times, but he said he had stopped for monetary reasons or because she begged him not to and he felt sorry for her. RP 394-95. He also said that she had filed for divorce this time.

Michael testified that, when they met, he and Veronica were both in the army. RP 326-27. Michael stayed in the army during the marriage,

so there were some times when he was stationed abroad or in a different state. RP 326-27.

At one point he got moved to Fort Lewis in Washington and, even though he repeatedly declared that he had already decided to end the relationship, he nevertheless invited Veronica to move up with him from their current location, applying for "quarters" so that she could do so. RP 400-402. Michael was on a deployment in Iraq in about April of 2009 when he started the online relationship with Meaungkhot, despite being married to Veronica. RP 329-30, 403. When he got back from Iraq in June of 2009, Michael had gotten a separate apartment and started dating Meaungkhot. RP 331-32.

Michael conceded that he did not tell Veronica about Meuangkhot but instead took Veronica with him on a road trip to Texas, sleeping in the same trailer at night but, he said, not being "intimate." RP 406-408. He said he had only allowed her to come along because he knew his duties to her and she "begged." RP 406-408. He planned to just let her off at her parents' home and did so, hooking up with Meuangkhot who had flown in to be with him, and driving back from Texas with his new girlfriend. RP 406-408.

Michael nevertheless maintained that he did not end his marriage to Veronica because he had started dating Meuangkhot, saying that it was just a "plus" that he met his new girlfriend during this time. RP 408.

Just as he lied to Veronica and did not tell her about Meuangkhot, Michael lied to Meuangkhot about Veronica, too. RP 310. He did not tell his new girlfriend that he was married and she only found out when they

were driving back from Texas together and Veronica called Michael on the phone. RP 446.

Veronica was not at home when officers first drove past the housing unit on the military base the night of the incident, but officers then saw what looked like her car driving into the area. RP 582-85. An officer opined that she was looking around and might have seen the police cars, and said it seemed Veronica's car speeded up a little. RP 582-86. The officers returned to their vehicles, activated their lights and sirens and followed her car, which she then stopped - strangely - in the middle of an intersection. RP 585. An officer admitted that Veronica had stopped the car in an abrupt manner and an unusual place, and that she seemed "calm and compliant." RP 603-604. When she was booked into jail, it was marked on the booking form that she was "suicidal," and she also apparently asked for some mental health help. RP 601-604.

After the shooting, the police released Veronica's car to Michael and he found some documents indicating that Veronica had at some point in the months before hired a private investigator to follow him around. RP 377. He said that the car drove fine when he picked it up, in contrast to the indication Veronica had made to a mental health professional that the car had not been running well and there was something wrong with it which had made her recently rent another car - the car she drove to Micahel's house that night. RP 379, 519. Witten had rented the car several days before, on December 1, 2009, and had returned it full of gas just after the incident occurred. RP 520-22. She had similarly rented a car from the same place in October, 2009, as well. RP 523-25.

A receipt in the car was traced to a gun shop, where Veronica had bought a gun and two kinds of ammunition on December 1, 2009, after having applied for the purchase about a week before. RP 488-90. The ammunition included a box of a very popular, common type which is called a "jacketed hollowpoint" and which someone testified is meant to inflict the "most damage without" leaving a "target." RP 493.

Dr. April Gerlock, a psychiatric nurse practitioner with a Ph.D in nursing, works at the Veteran's Administration and treats patients with post-traumatic stress disorder, in addition to being the principal investigator on a federally funded grant regarding the disorder and its relationship to "intimate partner violence." RP 856-57. Gerlock, who is also a clinical associate professor in advanced psychiatric nursing at the University of Washington and has testified for both prosecutors and defendants in multiple counties, has close to 31 years of experience in mental health practice. RP 864-65. She was asked to assess Veronica's psychological status and concluded that Veronica was suffering at the time of the incident not only from the major depressive disorder she had been laboring with for years but also post-traumatic stress disorder, disassociative disorder and a disorder of "extreme stress." RP 905-907. Gerlock testified of the impact of these disorders and how the long-term stress of the abuse had actually caused Veronica to start getting highs and lows similar to those a person who was "bipolar" would experience. RP 912-14.

Gerlock also detailed years of abuse which not only Veronica but others described as part of the relationship with Michael. RP 870-923.

Not only was Michael verbally abusive, calling Veronica names, putting her "down," calling her fat, saying her breasts were too small, calling her ugly, crazy, a bitch and a "cunt," threatening her, yelling at her and doing things to humiliate her in public, but he also engaged in violence which included strangling her, pushing her, hitting her on the head and other acts, followed by threats and promises to change when she tried to leave. RP 870-84. In Germany, the military police had gotten involved and Michael and Veronica had been required to go to mandatory couples counseling. RP 880-81. In Fort Hood, he threw things at her and things were so bad that, in fact, Veronica's mother and father, who had been living with Veronica and Michael, moved out because they "just couldn't live there in that home any more" with what was going on. RP 883. At the same time, unfortunately, Veronica's very traditional mother, who does not speak much English, believed that marriage was sacred and kept telling her daughter she needed to "work it out" with her husband. RP 884.

Veronica had gotten pregnant near the beginning of the relationship, even though Michael had claimed he could not have children. RP 880-82. Although Veronica had wanted to keep the child, Michael had pressured her into having an abortion, saying a kid would ruin their relationship and that he was not "ready." RP 879-80.

Over and over, Gerlock said, the records and her interviews showed what Gerlock described as a very "typical pattern that you see in domestic violence situations," with the traditional cycle of violence and then promises and asking to be forgiven. RP 885-86. At one point, in fact, Michael had created a video in which he was crying and asking for

Veronica's forgiveness. RP 886. Gerlock saw evidence of the abuse in the medical records and heard about it as well, from Veronica's mom and her sister, both of whom had been around the couple at significant times. RP 889-91. At some point things got so bad that even Veronica's mom started saying that Veronica needed to leave Michael instead of trying to work it out. RP 897.

In Gerlock's opinion, at the time of the incident, Veronica was suffering from a disassociative episode caused by her chronic, severe, post-traumatic stress disorder, here deep depression and the abuse she had suffered. RP 901-15. Gerlock explained that, during a disassociative episode or event, a person's brain is not connected up with what their body is saying and doing. RP 915. She gave the example of someone who was sleepwalking or had "highway hypnosis." RP 915. Gerlock testified that, after arriving at the apartment and hearing a woman's voice laughing, Witten "just kind of split off" and her body and mind were in different places and her unaware of what was actually going on. RP 917-18. During the episode, Veronica had reported not really hearing or thinking her ears were plugged up, not really being able to see everything, having no recollection of what she did and other symptoms which Gerlock said were common during such events. RP 918. During such episodes, the body is not "connected" where the head is "at," or, put another way, a person's cognition is not integrated with their action. RP 922.

Dr. Gerlock noted that, when she interviewed both Veronica and her mom, she did not see any evidence of deceit, nor did she see anything like "malingering." RP 945, 964.

Gerlock ultimately testified that Witten was already in a diminished state as far as her mental condition at the time and that the mental conditions were such at the time of the incident that Gerlock's professional opinion was that Witten did not have the capacity to form the mental state of intending to take a life or commit a crime or anything like that. RP 923-24. Witten's walking away "nonchalantly" and driving away slowly or driving around awhile are both consistent with being in a dissasociative episode and not yet "tracking," as was what happened during her arrest. RP 926-27.

D. ARGUMENT

REVERSAL IS REQUIRED BECAUSE THE PROSECUTOR REPEATEDLY ELICITED TESTIMONY REGARDING APPELLANT'S EXERCISE OF HER RIGHTS TO REMAIN SILENT AND BE FREE FROM SELF-INCRIMINATION, AFTER WHICH THE PROSECUTOR ARGUED A NEGATIVE INFERENCE FROM THE EXERCISE OF THOSE RIGHTS

Prosecutors are not just attorneys; they are "quasi-judicial" officers who bear a special responsibility to ensure fairness in a criminal proceeding even at the expense of "losing" a conviction. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Among the most significant limits placed upon a prosecutor's conduct as an advocate is the limit preventing her from arguing that a jury should draw a negative inference from an exercise of a constitutional right. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see also, Griffin v. California, 380 U.S.

609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Such argument not only violates the constitutional right in question but even further violates fundamental due process rights, because making such argument "chills" the exercise of a right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, both Ms. Witten's rights to remain silent and her due process rights were violated and this Court should reverse, because the prosecutor first repeatedly elicited testimony suggesting the jury should draw a negative inference from Ms. Witten's exercise of her constitutional rights to remain silent and to be free from self-incrimination, then relied on that testimony and Ms. Witten's silence in arguing her guilt. Further, because the prosecution cannot meet its extremely high burden of proving these constitutional errors harmless beyond a reasonable doubt, reversal and remand for a new trial is required.

a. Relevant facts

At trial, in direct examination of Pierce County Sherriff's Department Deputy Brian Heimann, the prosecutor asked about Ms. Witten's communications with police. RP 591. Heimann was the officer who had stopped Ms. Witten's car and arrested her on the night of the incident, also transporting her to the police department. RP 590-92. When the prosecutor asked about Witten's "demeanor" while in the police car, the Heimann responded that Witten had "[r]eally, no emotions," and "**didn't really speak at all.**" RP 591 (emphasis added). The prosecutor

then asked, "[d]o you recall the - **did she ask you any questions at that time**," and the officer responded, "[n]o." RP 591 (emphasis added). The prosecutor followed up by asked, "[w]hen you placed Ms. Witten under arrest, did you - **did she ask you any questions at that time?**" RP 591 (emphasis added). The officer again responded, "[n]o." RP 591.

A moment later, the prosecutor turned to discussing the 5-7 minutes the officer had spent inside his police car with Witten at the police department building, when they were waiting for another officer to arrive. RP 592. The prosecutor asked if, during that time, the officer observed Witten "doing anything" and if, "during that time period, **did she ask you any questions**?" RP 592 (emphasis added). After eliciting a negative response, the prosecutor asked if the officer had asked any questions of Witten, then moved on to the time Witten had spent in the interview room at the police station with the detectives, again asking about Witten's "demeanor." RP 593-94. The officer said, "[s]he did not cry, didn't really show any emotion" during the times when detectives were there but "[w]hen the detectives left the room, she cried," was shaking and "asked" the officer to "check on Michael" and to "check on her dogs." RP 594. The prosecutor established that the detectives would leave and come back and that during one of those times she made those requests, stating,

> **And the time that you've indicated that she actually said something to you,** there were two things that you said, that she asked you to check on Michael?

RP 595 (emphasis added). The officer said that was not in "response to any question or statement" he had made to Witten and that the request to

check on Michael had been followed by the request to check on the dogs. RP 595-96.

On cross-examination, counsel pointed out that Witten was read her rights and the officer told her that she did not have to speak to anyone. RP 604-607. The officer also said he asked if she was willing to speak with the officers and "she said, no, I'm not or something like that." RP 604. After that she did not initiate conversation or anything. RP 604 -607.

Later, in direct examination of Detective James Loeffelholz, the prosecutor returned to this theme of Witten not speaking after her arrest. Loeffelholz was the lead officer on the case and had gone first to the scene of the shooting and then to the police station after Witten's arrest to try to interrogate her. RP 724-44. Loeffelhelz testified about having decided who they thought "may have done this," Veronica Witten, and people trying to find her by calling her, going to her home and searching for her car, after which she was taken into custody, an arrest which occurred at about 6:48 that night. RP 731-32.

Loeffelholz said he had gone to the interview room at the police station and "introduced" himself to Witten, along with another detective, Detective Stepp. RP 736. The following exchange then occurred:

> Q: Okay. Now, you had - - did you have an opportunity to speak with Ms. Witten in the interview room?
>
> A: Briefly.

RP 737. The prosecutor asked if he told Witten about Michael's condition and whether, once the officer had his opportunity to speak with Witten, what he did as a "next step" in the investigation, discussing the gun and

the restraining order. RP 737. He said that once he had spoken with another officer, he returned to the interview room:

> Q: All right. So what was the next step after you spoke with Officer Mason?
>
> A: Then I went back and advised Veronica Witten that she was under arrest.
>
> Q: Did you advise her what it was that she was under arrest. for?
>
> A: I did.
>
> Q: Did she ask you any questions about the charges that you - that you indicated to her?
>
> [WITNESS]: I don't recall.
>
> [PROSECUTOR]: **If she had said something is that something that you would have indicated in your report**?
>
> [WITNESS]: If it was significant, I would have.

RP 738 (emphasis added).

Then, in cross-examination of Dr. Gerlock, the prosecutor asked again about Witten's "failure" to speak to police at the time of her arrest and whether that failure was evidence that Witten was, in fact, guilty and not suffering from a mental disease at the time, despite Gerlock's conclusions. After the prosecutor asked about how Witten had "followed the commands" of the officers at the stop, the prosecutor asked if there was any evidence that Witten had "**asked the officers who they were**" or that she had "**ask[ed] them if they were pulling her over for harassment**." RP 982-83 (emphasis added). The prosecutor also noted that, "apparently, when she is talked to by the detectives, **she didn't try to**

explain her circumstances or that she doesn't remember or anything like that to them" but just asked for them to check on her dogs and Michael. RP 984 (emphasis added).

In closing argument, the prosecutor then focused on how the "story" that Witten had presented through Gerlock about what had happened was not supported by the evidence and that this showed Witten's guilt. For example, the prosecutor argued, why would a person who bought a gun because they were fearful of an abusive spouse "go over to their home," why would someone want to reconcile with a man she has "accused through - - to Dr. Gerlock of 15 years of physical violence," and why would Ms. Witten not have gone to the front door and knocked if she just wanted to talk to Mr. Witten, rather than going around the dark side of the building to the back patio. RP 1054-58.

It was only in rebuttal closing argument, however, that the prosecutor raised the issue of what Witten had done when arrested. RP 1099. The prosecutor told the jury that "[o]ne of the things that hasn't been discussed, ladies and gentlemen, is about her [Witten's] contact with police." RP 1099. Next, the prosecutor said that Ms. Witten had reported to Gerlock that she was "still kind of fuzzy and that she only really started to come back to full consciousness once it is that she was in jail for a few days," but that the jury should look at "what it was that she did when she was contacted by the police," such as speeding up after seeing police there, responding to commands after stopping, and other things that indicated she was not "fuzzy," because she did what she was told to do. RP 1099-1100.

The prosecutor then went on to discuss when Deputy Heimann had arrested Witten:

> [A]nd then he talks with her right when he arrests her. They bring her down to talk with the detectives; and **when she's down there talking with the detectives and with Deputy Heimann, at no point in time did she ever ask them, "[w]hat are you doing? Why are you talking to me? What's going on?**
>
> **If you're fuzzy, don't you - - I don't understand. Why are you arresting me? What are you accusing me of? What do you think I've done. None of that, nothing to explain, look, I'm confused. I don't know where I am. I don't know how I got here. I don't know who you are. None of that.** When she gets down to the station, she says two things to Deputy Heimann. Would you have someone check on Michael?

RP 1100-1101 (emphasis added).

The prosecutor concluded by arguing that Witten knew that Michael was injured because she knew she had shot him and that she also equated "the importance of Michael's condition with what it is that she's really concerned about which is someone coming over and walking her dogs." RP 1102.

b. This repeated misconduct violated Witten's constitutional rights to remain silent and to due process

By eliciting this testimony and making these arguments, the prosecutor violated Witten's Fifth Amendment and Article 1, § 9 rights as well as her fundamental due process rights to fundamental fairness.

As a threshold matter, these issues are properly before this Court. If a prosecutor elicits testimony infringing upon the defendant's exercise of her constitutional rights, that issue is a "claim of manifest constitutional error, which can be raised for the first time on appeal." See State v.

Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.2d 1274 (2002).

On review, this Court should reverse, both because of the prosecutor's misconduct in eliciting improper testimony about Witten's exercise of her rights and also the prosecutor's misconduct in exploiting that evidence in her closing.

First, this testimony and misconduct violated Witten's Fifth Amendment and Article 1, § 9, rights to be free from self-incrimination and to remain silent in the face of accusation. Both the state and federal constitutions guarantee those rights. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. 1, § 9. Under those rights, a defendant may refuse to speak in the face of accusation, whether before or after arrest. See Easter, 130 Wn.2d at 243; see also State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1255 (2002). As a result, it is serious misconduct for the prosecutor to elicit testimony or make argument to even imply that the jury should apply any negative inference from the defendant's pre- or post-arrest silence. See, e.g., State v. Lewis, 130 Wn.2d 700, 705, 927 p.2d 235 (1996).

The rights of the defendant in this regard are defined in large part by whether the silence in question occurs before or after she is arrested and read her rights. See State v. Carnahan, 130 Wn. App. 159, 167, 122 P.3d 187 (2005). This is because, when a defendant is told she has the right to remain silent by the state, it is well-settled that the state may not then "comment on or otherwise exploit that decision," even for impeachment. 130 Wn. App. at 168.

Thus, in Doyle, the defendants were arrested for selling drugs and chose not to give a statement to police after they were read their rights. Doyle 426 U.S. at 618. At trial, the defendants testified, claiming that they were "framed." Doyle, 426 U.S. at 618. In cross-examination, the prosecutor asked the defendants why they had not told their story of being framed when they were arrested, implying that the failure to so speak proved their claims at trial were not true. Id.

On review, the U.S. Supreme Court held that this questioning was wholly improper misconduct, regardless of the state's strong interest in cross-examining the defendants in a criminal case:

> Despite the importance of cross-examination, we have concluded that the Miranda[3] decision compels a rejection of the State's position. The warnings mandated by that case, as a prophylactic means of safeguarding Fifth Amendment rights. . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says will be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. **Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.**

426 U.S. at 618 (emphasis added). The result was that the government "had broken its promises given in the Miranda warnings and violated due process of law" by first telling a defendant that they had the right to remain silent and then allowing that silence "to be used to impeach an explanation subsequently offered at trial." Doyle, 416 U.S. at 618; see State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008).

Ultimately, the U.S. Supreme Court held, it is completely improper

[3] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 695 (1966).

to allow impeachment of a defendant with post-arrest, post-Miranda warnings silence, although the Court left it up to each state court to decide whether "to allow impeachment through the use of pre-arrest silence." See Jenkins v. Anderson, 447 U.S. 231, 232-33, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980); see also Easter, 130 Wn.2d at 235 (pre-arrest silence can never be used as substantive evidence of guilt but only as impeachment in certain limited cases).

As a result, in cases where, as here, the silence in question occurs **after** the defendant has been read her rights and has chosen not to waive those rights and speak to police, this post-arrest "silence" cannot be used against her, even to impeach her in any way. See Belgarde, 110 Wn.2d at 511. Indeed, this state's Supreme Court has declared, the use of "defendant's silence following receipt of *Miranda* warnings is fundamentally unfair" and thus violates both the rights to remain silent and the due process clauses of the state and federal constitutions, "since the giving of the warnings implicitly assures [the] defendant that silence will carry no penalty" and "[s]ilence in the wake of such warnings is 'insolubly ambiguous' and may merely reflect reliance on the right to remain silent rather than a fabricated trial defense." Belgarde, 110 Wn.2d at 511.

In cases where comments are made, this Court examines whether there was really a "comment" or just a "passing reference" to the right to remain silent. For example, a comment was deemed so "subtle and . . . brief" that it was not problematic where an officer testified that, when she answered the alleged victim's phone after the incident and it was the

defendant calling on the phone, the defendant said he did not want to talk to the police. See State v. Thomas, 142 Wn. App. 589, 596, 174 P.3d 1264, review denied, 164 Wn.2d 1026 (2008). The prosecutor, however, had then exploited that passing reference to the defendant's silence, arguing in closing that Thomas had not wanted to talk to police because of his guilt and faulting Thomas for failing to return to the scene of the crime where the police were to tell his "side" of the story if in fact his "side" had been rtue. Id. The prosecutor also said that, regarding Thomas, "[h]e's just been accused of a crime. I mean, he knows that that's what going on. The cops showed up there for a reason." This Court found that this argument clearly crossed permissible bounds and violated the defendant's rights to remain silent and be free from self-incrimination by implying that some negative inference should be applied against Thomas for failing to tell his side of the story to police. Id. The obvious implication was that, if he was telling the truth about his defense, Thomas would have told someone something at the time when police first arrived. Id.

Similarly, here, the obvious import of all of the testimony and argument was to cast a negative doubt on Witten's "failure" to speak to police after being arrested - and to use that negative implication as evidence of Witten's guilt. If Witten was "fuzzy" and suffering from mental disorders at the time of the incident as she claimed, the prosecutor suggested, Witten would have spoken to police, would have expressed some confusion when arrested or told the police that she had a mental condition or something. (Of course, this ignores the notation of a request for mental health assistance made on the booking form, when Veronica

asked for such help from the police.)

It appears that the prosecution thought this evidence that Witten had not said certain things to police after her arrest was somehow admissible to cast doubt on Witten's defense of mental illness, overlooking the fact that the evidence was, nevertheless, evidence that Witten had exercised a constitutional right to silence.

But post-arrest, post-Miranda silence cannot be used as evidence to disprove mental illness without running afoul of the same principles and constitutional provisions regarding the rights to remain silent and fundamental fairness in the context of proving a criminal case. And the U.S. Supreme Court has so held. In Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986), the defendant entered a plea of not guilty by reason of insanity and the prosecutor argued that, when the defendant was twice read his rights and twice expressed a desire to consult with counsel before answering questions, that "silence" was admissible to disprove the insanity:

> He goes to the car and the officer reads him his Miranda rights. **Does he say he doesn't understand them? Does he say 'what's going on?" No.** He says, "I understand my rights. I do not want to speak to you. I want to speak to an attorney. Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his act. . .

474 U.S. at 287 n. 2 (emphasis added). The prosecutor also urged the jury to see the defendant's acts in deciding not to talk to police as "another physical overt indication by the defendant" indicating that he was not insane and thus was guilty as charged. Id.

In holding that such argument completely improper, the U.S.

Supreme Court first noted all of the cases reiterating that there is a "fundamental unfairness" in "implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." Wainwright, 474 U.S. at 291.

Further, the Court specifically rejected the idea that "proof of sanity is significantly different from proof of commission of the underlying offense." 474 U.S. at 291. By eliciting the testimony in its case in chief, the Court said, the prosecutor ensured that "the silence was used as affirmative proof [of guilt]. . .not as impeachment." 474 U.S. at 292. The Court also declined to accept the state's argument that there was any "distinction" between using silence to impeach trial testimony on a defense and "using silence to overcome a defendant's plea of insanity." Id. The Court declared:

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. **It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.**

Wainwright, 474 US. at 292 (emphasis added). Further, the Court held, even if the "silence" in question is very "probative of sanity," "the "State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest" could have been served by "carefully framed questions" which avoided mentioning the defendant's exercise of

his constitutional rights to remain silent. Id.

Matire v. Wainwright, 811 F.2d 1430 (11th Circ. 1987), is also instructive. In that case, the defendant shot his wife's boyfriend in an altercation in which Matire himself was wounded. 811 F.2d at 1431-32. He was informed of his rights and declined to make a statement but was overheard making some incriminating statements to his mother. Id.

At trial, Matire raised a claim of insanity. 811 F.2d at 1432. In direct examination of a police officer, the prosecutor 1) asked the officer if the defendant had responded to the questions of the officer when being read his rights, 2) elicited testimony that the defendant had asked for an attorney before any questions were asked and, 3) asked the officer if Matire had made a statement to the officer, garnering testimony that he had said nothing. Id. Later, another officer said that he had read Matire his rights in the hospital and the defendant had "replied he did not wish to make a statement." Id. Then, in closing argument, the prosecutor referred to Matire's post-arrest silence several times as evidence "rebutting the insanity defense." Id. As part of that argument, the prosecutor reminded the jury that, the "very first thing" that happened to Matire after his arrest was that he was read his rights and "asked if he wanted to say anything, and he said no," but that he at one point "babbled on" because he was emotionally upset, something the prosecutor said proved that, while Matire was "upset fully" he was also "cognizant of what he did," and "knew he had shot somebody." 811 F.2d at 1433.

After multiple appellate proceedings, on a petition for a writ of habeas corpus, the 11th circuit reversed. The testimony of the officers

about the post-arrest silence and the prosecutor's closing arguments were "impermissible comments on Matire's post-arrest silence," the Court held. 811 F.2d at 1435. Further, those comments were violations of the defendant's due process rights. Id. Reversal was required because those comments were used by the prosecutor "to highlight the defendant's silence and to utilize it to defeat his insanity defense," who also, in closing, "linked Matire's desire to remain silent to his insanity defense, arguing that he understood what he was doing" and thus was guilty. Id. Under those circumstances, the Court held, the prosecution could not prove the errors harmless beyond a reasonable doubt under the constitutional harmless error standard, because:

> At three different times during Matire's trial, reference was made to the fact that Matire wished to remain silent, including the prosecutor's closing argument linking Matire's silence to the insanity issue. Significantly, insanity was the thrust of his defense[.]

811 F.2d at 1436.

Like in Matire, here the defendant raised a mental health defense. Also like in Matire, the prosecutor repeatedly elicited testimony drawing attention to Witten's "failure" to talk to police, to claim confusion or ask questions - "failures" which the prosecutor argued proved that Witten was not in fact suffering from diminished capacity but had known what she was doing and was guilty as charged. Under Wainwright, the prosecutor's conduct in eliciting the testimony about and making arguments regarding Witten's exercise of her post-arrest rights to remain silence, was serious, constitutionally offensive misconduct, in violation of Witten's state and federal constitutional rights to be free from self-incrimination and her due

process rights to fundamental fairness.

Reversal is required. As the Court noted in Easter, comments on the defendant's "failure" to "speak up" effectively sound a bell which, "once run cannot be unrung." 130 Wn.2d at 238-39 (quotations omitted). Nor can the state meet the heavy burden of proving these constitutional errors "harmless" beyond a reasonable doubt. Romero, supra, is instructive. In that case, the defendant, Romero, was charged with unlawful possession of a firearm which had reportedly been shot at a mobile home in the middle of the night. 113 Wn. App. at 783. An officer using a flashlight had responded to the scene and saw Romero coming around the front of the mobile home with his right hand behind his back. Id. The officer repeatedly ordered Romero to show his hands but Romero refused, instead running around the home and later being found inside. Id. At trial, an officer said that Romero and his family "did not respond to our questions" during the arrest and that Romero was "somewhat uncooperative" when arrested. 113 Wn. App. at 785. The officer also said that, when read his rights, Romero chose "not to waive, would not talk to" police. 113 Wn. App. 785.

In holding that this constitutional error could not be deemed "harmless," the Romero Court discussed the long line of cases regarding comment on a defendant's decision not to talk to police, noting that, even when the prosecutor does not "harp" on such comments or intentionally exploit them, reversal was still required. Id. And indeed, the Court reached this conclusion even after concluding, in another part of its decision, that the evidence admitted at trial was ample to support a

challenge to the sufficiency of the evidence to convict. Id. This decision highlights the distinction between the forgiving "sufficiency" standard of review and the constitutional harmless error standard, which compels reversal unless and until the prosecution can prove, beyond a reasonable doubt, that no reasonable jury would have *failed* to convict absent the error. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Similarly, in Easter, while the state's theory was supported by evidence, there was also evidence consistent with Easter's innocence and "the State's emphasis on Easter silence to argue his guilt may well have swayed the jury." 130 Wn.2d at 242.

Here, the testimony and subsequent exploitation of the evidence by the prosecutor to argue Witten's guilt may well have swayed the jury in this case. While there was evidence to support the prosecution, there was also evidence to support the defense - including medical records which seemed to show some past violence and the testimony of Gerlock.

Most importantly, the prosecution cannot prove these serious constitutional errors harmless beyond a reasonable doubt. Given the facts and evidence in the case, it is entirely likely that a juror could well have believed the defense expert and acquitted Witten, had the jurors not been so tainted by the idea that Witten had some duty to speak or that if she was really not guilty she would have spoken to police. Under cases like Romero, because there is conflicting evidence, it is not possible to say that "no reasonable jury would *fail* to convict." Romero, 113 Wn. App. at 786.

Unlike Romero, this case did not involve a "volunteered"

statement by an officer - it involved multiple, repetitive statements made by officers upon direct questioning by the prosecutor, who then exploited those answers in closing to use that "silence" as evidence of guilt. Not only did the prosecutor commit serious, constitutionally offensive misconduct, the prosecution cannot on appeal show that misconduct to be "harmless." Reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should grant Ms. Witten the relief to which she is entitled.

DATED this 27th day of December, 2011.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Private Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by efiling through this Court's system this date, and by first-class mail, postage prepaid, to Veronica Witten, DOC 348230, WCCW, 9601 Bujacich Rd. NW, Gig Harbor, WA. 98332-8300.

DATED this 27th day of December, 2011.

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant Hernandez
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICES

December 27, 2011 - 2:46 PM

Transmittal Letter

Document Uploaded: 420210-Appellant's Brief.pdf

Case Name: State v. Witten

Court of Appeals Case Number: 42021-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: K A Russell Selk - Email: **karecrire@aol.com**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us